Before the
Administrative Hearing Commission
State of Missouri

DIRECTOR OF DEPARTMENT OF PUBLIC SAFETY, Petitioner, vs. AARON S. ABBOTT, Respondent.	)	No. 13-1500 PO

DECISION

Cause exists to discipline the peace officer license of Respondent Aaron S. Abbott because he committed two criminal offenses and committed two acts of moral turpitude.

Procedure

On August 21, 2013, Petitioner Director of the Department of Public Safety filed a complaint seeking to discipline Mr. Abbott's peace officer license. Mr. Abbott was served on August 27, 2013, but did not file an answer. The Director filed a motion to amend the complaint on October 2, 2013, which we granted on October 3, 2013. Though informed by our notice of complaint and notice of hearing of the consequences of not filing an answer, Mr. Abbott did not file an answer or otherwise respond to the amended complaint.

By failing to answer or otherwise respond to the complaint, Mr. Abbott has admitted the

allegations of fact that it contains. 1 CSR 15-3.380(7)(C)1.[1]

The Director filed a motion for summary decision on December 3, 2013. We notified Mr. Abbott that he had until December 18, 2013, to file any response, but he filed nothing.

Under 1 CSR 15-3.446(6)(A), we may grant summary decision "if a party establishes facts that entitle any party to a favorable decision and no party genuinely disputes such facts." The parties must establish the facts by admissible evidence, which includes stipulations, pleadings of the adverse party, discovery responses of the adverse party, affidavits, or other evidence admissible under the law. 1 CSR 15-3.446(6)(B).

Here, the Director submitted a business records affidavit with his motion. The affidavit is admissible evidence under 1 CSR 15-3.446(6)(B). The Director also submitted his requests for admissions, to which Mr. Abbot did not respond. Mr. Abbott has admitted the truth of each of those requests, to the extent that they relate to statements or opinions of fact, or the application of law to fact, because he did not timely respond. Mo. S. Ct. R. 59.01(a). Those admissions are discovery responses of an adverse party and are admissible under 1 CSR 15-3.446(6)(B).

Additionally, and as noted above, Mr. Abbott has admitted the allegations contained in the Director's amended complaint, and such admissions are admissible evidence. *See United Mo. Bank, N.A. v. City of Grandview*, 179 S.W.3d 362, 371 (Mo. App. W.D. 2005) (admissions against interest are admissible).

We therefore draw our findings of fact from the affidavit and Mr. Abbott's various admissions.

[1] All references to "CSR" are to the Missouri Code of State Regulations, as current with amendments included in the Missouri Register through the most recent update.

Findings of Fact

1. Aaron S. Abbott was issued a peace officer license by the Director of the Department of Public Safety. His license was valid at all times pertaining to this action.

2. Mr. Abbott possessed hydrocodone tablets on August 22, 2011. He did not at that time have a prescription or other authorization to possess hydrocodone.

3. The hydrocodone tablets had been prescribed to an inmate who was then incarcerated in the Clinton County, Missouri jail.

4. Mr. Abbot appropriated the hydrocodone tablets on August 22, 2011 with the purpose to deprive the inmate of it, by taking them out of the inmate's medication box.

5. In appropriating the inmate's hydrocodone tablets, Mr. Abbott acted without the inmate's consent or by means of deceit or coercion.

6. Mr. Abbott was aware of the presence and nature of the hydrocodone tablets he appropriated.

7. Mr. Abbott appropriated the hydrocodone tablets while acting in his capacity as a peace officer, and while on active duty or under color of law.

Conclusions of Law

We have jurisdiction. § 590.080.2.[2]

The Director is responsible for filing a complaint alleging cause exists to impose discipline, *id.*, and bears the burden of proving so by a preponderance of the evidence, *see Kerwin v. Mo. Dental Bd.*, 375 S.W.3d 219, 229-230 (Mo. App. W.D. 2012)(dental licensing board demonstrates "cause" to discipline by showing preponderance of evidence). A preponderance of the evidence is evidence showing, as a whole, that "the fact to be proved [is]

[2] All references to "RSMo" are to the Revised Statutes of Missouri (Supp. 2012) unless otherwise noted.

more probable than not." *Kerwin*, 375 S.W.3d at 230 (*quoting State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App. W.D. 2000)).

Here, the Director alleges in his complaint that there is cause for discipline of Mr. Abbott's peace officer license under § 590.080.1 because Mr. Abbott:

> (2) Has committed any criminal offense, whether or not a criminal charge has been filed; [or]
>
> (3) Has committed any act while on active duty or under color of law that involves moral turpitude[.]

We agree with the Director.

Commission of criminal offenses

Mr. Abbott committed the criminal offenses of stealing and possession of a controlled substance.

Section 570.030, RSMo (Cum. Supp. 2010), prohibits stealing, which occurs when:

> [a] person…appropriates property or services of another with the purpose to deprive him or her thereof, either without his or her consent or by means of deceit or coercion.

The undisputed evidence shows that Mr. Abbott appropriated hydrocodone tablets from an inmate with the intent to deprive the inmate of it, and that Mr. Abbott did so without the inmate's consent or by means of deceit of coercion. We therefore conclude that Mr. Abbott violated § 570.030.

Section 195.202.1, RSMo provides that, "[e]xcept as authorized by sections 195.005 to 195.425, it is unlawful for any person to possess or have under his control a controlled substance." Violation of § 195.202 requires that a person have: "(1) conscious and intentional possession of the substance, either actual or constructive; and (2) awareness of the presence and

nature of the substance."[3] Hydrocodone is a controlled substance. § 195.017.4(1)(a)(j), RSMo (Cum. Supp. 2010). The undisputed evidence shows that Mr. Abbott intentionally possessed the hydrocodone, by taking it from an inmate's medication box. Mr. Abbott had no prescription for the medication or other lawful reason to possess it.

Further, we conclude that when Mr. Abbott stole the hydrocodone from the inmate's medication box, Mr. Abbott was aware of the presence of the substance.

We also conclude that Mr. Abbot had knowledge of the nature of the substance. Prescription drugs must be dispensed in a container labeled with the patient's name and the type of medicine, § 195.100.5, RSMo (2000), and kept by the user in that labeled container, § 195.110, RSMo (2000). Based on the totality of the record, we conclude that the hydrocodone in the inmate's medication box had been prescribed to the inmate, was properly labeled with the inmate's name and as hydrocodone, and was placed and kept in the medication box on behalf of the inmate in the normal course of jail operations. As noted above, hydrocodone is a controlled substance. § 195.017.4(1)(a)j. And possession of controlled substances in a jail without a prescription is a crime. §221.111.1(1), RSMo. As a peace officer working at a jail, Mr. Abbott can be expected to be aware of the law. Based on the totality of the record, and the inferences we draw therefrom, we conclude Mr. Abbott had knowledge of the nature of the substance he appropriated.

We therefore conclude Mr. Abbott violated § 195.202.

Because Mr. Abbott committed two criminal offenses, the Director has established cause under § 590.080.1(2).

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[3] *State v. Anderson*, 386 S.W.3d 186, 190 (Mo. App E.D. 2012).

Commission of acts of moral turpitude
while on active duty or under color of law

Section 590.080.1(3) allows for discipline if Mr. Abbott "[h]as committed any act while on active duty or under color of law that involves moral turpitude[.]" Mr. Abbott admitted he committed the relevant acts while on active duty or color of law. Because the admission is in the disjunctive, we will briefly examine the evidence and application of law to fact.

The totality of the evidence demonstrates Mr. Abbott was on active duty when he committed the relevant act at the jail. He committed it in his capacity as peace officer, and we gather that he was at the jail because he was employed there or otherwise permitted to be there.

The phrase "under color of law" is not defined for purposes of § 590.080.1(3), so, as a legal term of art, it is afforded its "peculiar and appropriate meaning in law[,]" § 1.090, RSMo (2000). The phrase is commonly examined in the context of civil rights cases under 42 U.S.C. § 1983, where it means a state actor exercised power he possessed by virtue of state law and was only able to do so because he had the authority of state law. *West v. Atkins*, 487 U.S. 42, 49 (1988); *Dossett v. First State Bank*, 399 F.3d 940, 949 (8th Cir. 2005). A misuse of power possessed under state law is action taken under color of state law, and so includes acts taken under pretense of the law and acts overstepping the authority provided by the law. *Dossett*, 399 F.3d at 949.

We conclude Mr. Abbott acted under the color of law when he stole and possessed the hydrocodone. The undisputed evidence shows that he stole the hydrocodone from a jail inmate's medication box at the Clinton County Jail. We infer from the totality of the record that he was working there or otherwise lawfully present at the jail when he did so. Jails, and in particular areas of jails that store controlled substances, are secure facilities that are not accessible by the general public. *See West v. Atkins*, 487 U.S. 42, 57 n.15 (1988) (a prison hospital is "specifically

designed to be removed from the community"); *Multiple Claimants v. North Carolina Dept. of Health and Human Services*, 626 S.E.2d 666, 673 (N.C. Ct. App. 2006) ("inmates are in jail specifically so that they will be separate from the general public"). Based on the totality of the evidence, Mr. Abbott had authority granted to him to enter secure parts of the jail, and stole the hydrocodone from an inmate's medication box while exercising that authority. Absent the authority granted him by the State, Mr. Abbott would not have been able to enter the secure parts of the jail. Thus, we conclude that he was acting under color of law when he stole hydrocodone from the jail.[4]

As for moral turpitude, the peace officer disciplinary statute does not define the phrase, but the concept exists in other disciplinary contexts and has been examined by Missouri courts. For example, in attorney disciplinary cases, the Supreme Court has "long defined moral turpitude as 'baseness, vileness, or depravity' or acts 'contrary to justice, honesty, modesty or good morals.'" *In re Duncan*, 844 S.W.2d 443, 444 (Mo. 1993) (and cases cited therein). *See also Brehe v. Mo. Dep't of Elem. and Secondary Educ.*, 213 S.W.3d 720, 725 (Mo. App. W.D. 2007) (same definition used in discipline of teaching certificate).

We note that § 590.080.1(3) refers to "acts" of moral turpitude, not "crimes" of moral turpitude. But Missouri courts have examined several types of crimes in license discipline cases and held that certain ones always constitute acts of moral turpitude, others may, and some never do. We conclude the courts' analyses in such cases are instructive for purposes of application of

[4] The allegations in the Director's complaint concerning what happened at the jail include scant detail. The requests for admissions likewise address little detail. If the Director had more information available to him than the relatively bare bones included in the complaint or addressed in his requests for admission, we presume our discussion would have been shorter and simpler in this respect. The same observation might be made with respect to the issue of Mr. Abbott's knowledge of the nature of the substance he appropriated, examined earlier in our decision.

§ 590.080.1(3). One such case is *Brehe*, in which the court explained the three classifications of crimes:

> 1. crimes that necessarily involve moral turpitude, such as fraud (Category 1 crimes);
> 2. crimes "so obviously petty that conviction carries no suggestion of moral turpitude," such as illegal parking (Category 2 crimes); and
> 3. crimes that "may be saturated with moral turpitude," yet do not necessarily involve it, such as willful failure to pay income tax or refusal to answer questions before a congressional committee (Category 3 crimes).

213 S.W.3d at 725 (*quoting Twentieth Century Fox Film Corp. v. Lardner*, 216 F.2d 844, 852 (9th Cir. 1954)). Category 1 crimes, such as murder, rape, and fraud, are invariably crimes of moral turpitude, and Category 3 crimes require inquiry into the circumstances. *Brehe*, 213 S.W.3d at 725.

"Courts invariably find moral turpitude in the violation of narcotic laws." *In re Frick*, 694 S.W.2d 473, 479 (Mo. 1985). *Compare In re Shunk*, 874 S.W.2d 789, 791-792 (Mo. 1993) (possession of narcotics is crime of moral turpitude justifying attorney disbarment or other discipline). Mr. Abbott's unauthorized possession of a controlled substance is a Category 1 crime and therefore an act of moral turpitude.

Mr. Abbott's act of stealing is not invariably treated as a Category 1 crime, based upon our review of the case law. We therefore treat it as a Category 3 crime, and examine the circumstances. Mr. Abbott stole hydrocodone from a jail inmate. Because possessing the controlled substance is an act of moral turpitude, we conclude that stealing the controlled substance in order to possess it is also an act of moral turpitude. Additionally, we conclude that abusing one's position as a peace officer in order to steal items from jail inmates constitutes an

act contrary to justice, honesty, and good morals. Peace officers in positions of authority over incarcerated persons are expected to keep the law, not break it.

Mr. Abbott committed two acts of moral turpitude while on active duty or under the color of law. There is cause for discipline under § 590.080.1(3).

Summary

The Director has cause under § 590.080.1(2) and (3) to discipline Mr. Abbott's peace officer license. We cancel the hearing set for January 23, 2014.

SO ORDERED on January 7, 2014.

\s\ Alana M. Barragán-Scott
ALANA M. BARRAGÁN-SCOTT
Commissioner